COPY

Supreme Court, U.S.
FILED

No. 951882 APR 29 1996

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CALIFORNIA,
Petitioner,

v.

JESS RODERICK MITCHELL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SIXTH DISTRICT COURT OF APPEAL
OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
CATHERINE A. RIVLIN
Supervising Deputy Attorney General
JEREMY FRIEDLANDER
Deputy Attorney General
Counsel of Record
50 Fremont St., Room 300
San Francisco, CA 94105
Telephone: (415) 356-6150
Counsel for Petitioner

ISSUES PRESENTED

1. Is an erroneous instruction on an element of an offense subject to harmless error analysis if, under the instructions the jury received, the jury could have made findings and considered evidence establishing that the jury would have made the requisite findings for conviction had it been properly instructed? Yes.

2. Given the fact that materiality is an element of the California crime of perjury, could it be harmless error for a trial court in a California perjury trial to instruct the jury that the defendant's allegedly perjurious statements were material ones? Yes.

3. Is an erroneous instruction on an element of an offense actually harmless error if the findings the jury made and the evidence it considered, when assessed in light of each other, establish that the jury would still have convicted had it been properly instructed? Yes.

4. If a state prosecutes a defendant for perjury because he allegedly gave a false name (and made other false statements) in an application for the driver's license, and if the jury is instructed not to convict without finding that the defendant made a false statement in the application, and if the jury considers overwhelming evidence that the state issued the license in the false name, was it actually harmless error for a trial court to have instructed the jury that the defendant's allegedly perjurious statements were material ones? Yes.

TABLE OF CONTENTS

	Page
PETITION FOR WRIT OF CERTIORARI TO THE SIXTH DISTRICT COURT OF APPEAL OF CALIFORNIA	1
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS AND PROCEDURAL CIRCUMSTANCES	3
REASONS FOR GRANTING THE WRIT	6
A. The Jury-Findings, Evidence-Considered Test: A Universal, Three-Step Approach To Analyzing Instructional Errors On Elements Of An Offense	8
1. Exactly What Was The Error?	8
2. Could The Error Have Been Harmless?	8
3. Was The Error Actually Harmless?	9
4. The Basis Of The Jury-Findings, Evidence-Considered Test	10

TABLE OF CONTENTS, CONT'D

B. The Jury-Findings, Evidence-Considered Test Applied To This Case 11

1. The Error 11

2. The Error Could Have Been Harmless. 11

3. The Error Actually Was Harmless. 13

C. By Granting Certiorari, This Court Can Correct Basic, Widespread Errors In The Way Reviewing Courts Analyze Whether An Instructional Error On An Element Of An Offense Is Harmless. 15

1. The Flawed "Error Characterization" Approach 16

2. The "Element In Mind" Notion 22

3. The Principle That An Instructional Error Is Not Harmless If It Prevented The Defense From Adducing Substantial Evidence On The Element In Question 24

4. Summary 25

CONCLUSION 26

TABLE OF AUTHORITIES

	Page
Cases	
Boyde v. California 494 U.S. 370 (1990)	8
Carella v. California 491 U.S. 263 (1989)	9, 10, 18-20
Estelle v. McGuire 502 U.S. 62 (1991)	8, 11
People v. *Corey* 35 Cal.App.4th 717 (1995)	9
People v. Hedgecock 51 Cal.3d 395 (1990)	11
People v. *Jerry R.* 29 Cal.App.4th 1432 (1994)	9
People v. Kobrin 11 Cal.4th 416 (1995)	6, 7, 15-19, 21-26
People v. Matula 52 Cal.2d 591 (1959)	12
People v. Mitchell (H012785)	1
People v. Pierce 66 Cal.2d 53 (1967)	12

TABLE OF AUTHORITIES, CONT'D

Pope v. Illinois
481 U.S. 497 (1987) 10, 18, 24

Rose v. Clark
478 U.S. 570 (1986) 10, 18

Roy v. Gomez
___ F.3d ___
1996 U.S. App.LEXIS 7715
(9th Cir. 1996) 19-21, 25

Sullivan v. Louisiana
508 U.S. ___
113 S.Ct. 2078 (1993) 11, 16, 17

United States v. Gaudin
515 U.S. ___
115 S.Ct. 2310 (1995) 6, 7

United States v. Gaudin
28 F.3d 943 (9th Cir. 1994) 17, 18, 22, 25

United States v. Gaudin
997 F.2d 1267 (9th Cir. 1993) 15, 17, 18, 22, 23, 25

United States v. Hove
52 F.3d 233 (9th Cir. 1995) 17

United States v. Stein
37 F.3d 1407 (9th Cir. 1994) 17

Yates v. Evatt
500 U.S. 391 (1990) 8, 10

TABLE OF AUTHORITIES, CONT'D

Constitutional Provisions

United States Constitutiion
Fifth Amendment 2

United States Constitution
Sixth Amendment 2

United States Constitution
Fourteenth Amendment 2

Statutes

California Corporations Code
§ 25401 9

California Penal Code
§ 118 7
§ 123 11
§ 246.3 9

United States Code
Title 28, § 1257(a) 2

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No.

CALIFORNIA,
Petitioner,

v.

JESS RODERICK MITCHELL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SIXTH DISTRICT COURT OF APPEAL OF CALIFORNIA

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, Sixth District, entered on December 19, 1995.

OPINIONS BELOW

Petitioner seeks review of the decision of the California Court of Appeal, Sixth District, in *People v. Mitchell* (H012785), in which the court held that the trial court committed reversible error in a perjury prosecution by instructing the jury that the defendant's allegedly perjurious statements were material. Appendix A (pp. 23-24).

JURISDICTION

Petitioner sought review in the California Supreme Court. The California Supreme Court denied review on March 27, 1996. Appendix B. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

This case raises the question of the circumstances under which a defendant's right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and to a jury trial under the Sixth and Fourteenth Amendments require reversal of a conviction if the trial court instructs the jury that the prosecution has proved one of the elements of the offense.

STATEMENT OF THE CASE

Through several amended informations the District Attorney of Santa Clara County charged respondent with ten crimes: robbery, attempted murder, assault with a firearm, auto theft, possession of stolen property, fraudulent use of an access card with intent to defraud, carrying a concealed weapon in a vehicle, two counts of carrying a loaded firearm in a vehicle, and perjury in applying for a driver's license. The jury convicted on all counts.

In a decision filed on December 19, 1995, California's Sixth District Court of Appeal reversed the perjury conviction and affirmed the judgment in all other

respects. Appendix A, p. 26. On March 27, 1996, the California Supreme Court denied review. Appendix B.

STATEMENT OF FACTS AND PROCEDURAL CIRCUMSTANCES

Some person or persons made an application for a California driver's license to the Department of Motor Vehicles (DMV) in the name of one "Jesse Willard." The application was dated February 20, 1990, and was signed "Jesse Willard." The application form asked whether the applicant had previously applied for or been issued a California driver's license. In the space provided on the form for the answer to this question, the application was marked with an "X" in the answer box designated "No." The application also asked whether the applicant had applied for a California driver's license or identification card under a different name within the past seven years. Again, the answer box designated "No" was marked with an "X." People's Exh. 69a.

The Department of Motor Vehicles issued driver's license A7270602 in the name of "Jesse Willard" on February 20, 1990. People's Exh. 69a. On April 19, 1990, a gun was sold to one "Jesse Willard," who used California driver's license A7270602 as identification. RT 796, 807-809; People's Exh. 70a. On May 8, 1991, another gun was sold to "Jesse Willard," who again used that license as identification. RT 803-804; People's Exh. 70b.

Respondent's real name was Jess Mitchell. RT 526-527, 552-553. He had several California driver's licenses in that name before 1990. RT 2419-2420; People's Exh. 125.

Respondent testified that he paid a company $500 (RT 2425, 2426, 2429) to fix his credit problems

and that as part of the service the company helped him obtain a driver's license in a different name, "Jesse Willard." RT 2400-2401, 2402, 2423-2424, 2426-2427, 2429, 2434-2435, 2526. Although the information on the driver's license application came from information he provided to the company (RT 2427), respondent contended that he did not fill out the application (RT 2402, 2426-2427, 2430, 2433) and, indeed, never saw it (RT 2427) until the trial. RT 2430. He denied signing it. (RT 2427.) He went to the DMV office (RT 2428), was met there by a woman (RT 2402, 2429), and was "told to sign my name as such-and-such, Jesse Willard, and take a thumbprint, do the picture, and things to that effect." RT 2402. He acknowledged that his picture and thumbprint appear on the license the DMV issued to him in the name of "Jesse Willard." RT 2434-2435; People's Exh. 69a.

Respondent represented himself at trial. He addressed the perjury count as follows in his closing argument to the jury:

> "I had no knowledge that application ever existed until he [the prosecutor] showed it to me as evidence. I have to take responsibility though for it being instituted because it was for me, it wasn't for anyone else. That was for Jess Mitchell. But I can't take responsibility for somebody actually having filled it out and with -- well, you know the name they put on it because that's what I asked for. But I did go through a company and asked for that. I did actually do that. You can make a joke out of it, but that's what I did." RT 2721.

The jury was instructed as follows:

" . . . Count ten alleges a violation of the California Penal Code Section 118, perjury, defined as follows: every person who declares on any driver's license application under penalty of perjury and willfully states as true any *material matter* [emphasis added] which is false and which such person knows to be false is guilty of the crime of perjury in violation of section 118 of the California Penal Code.

"In order to prove this crime, each of the following elements must be proved: one, a person declared under the penalty of perjury that the driver's license application was true and correct with knowledge that the statement was made under penalty of perjury. Two, the declaration under penalty of perjury was committed [sic: "permitted"] by law. Three, such person declared as true a matter which was false and which such person knew was false. And four, such person had the specific intent to declare falsely under penalty of perjury.

"It is alleged that the defendant made the following false statements in this case. That he had never before had a California's driver's license, that

> he had not applied for a California driver's license under a former or a different name within the past five years[,] and that he gave a false name. *If you find that the defendant made one or more of the statements as charged, such statements were material matters within the definition of perjury. . . .*" RT 2750 [Emphasis added].

Relying on the California Supreme Court's decision in *People v. Kobrin*, 11 Cal.4th 416, 428-430 (1995), the Court of Appeal reversed the perjury conviction with the following explanation:

> "Because the removal of the materiality issue from the jury is reversible per se, the trial court's error is incurable by harmless error analysis. [Citation.]" Appendix A, p. 24.

REASONS FOR GRANTING THE WRIT

United States v. Gaudin, 515 U.S. ___, ___; 115 S.Ct. 2310, 2320 (1995), established that the Constitution requires the state to prove each element of a crime to a jury, not a court, before a defendant may be lawfully convicted of that crime. The government in *Gaudin* did not raise and, hence, this Court did not address the issue of whether and, if so, under what circumstances it is harmless error for a trial court to decide an element of an offense. *Id.* at 2321 (Rehnquist, C.J., concurring). This case presents that issue.

Because materiality is an element of the California crime of perjury (*People v. Kobrin*, 11 Cal.4th

at 426-427, *supra*; Cal. Pen. Code, § 118), the trial court committed federal constitutional error under *Gaudin* by deciding the materiality issue itself rather than submitting it to the jury. We contend here, as we did in state court, that the error was harmless. Thus, this case presents the logical followup to *Gaudin*.

We propose a harmless error approach that functions coherently, applies to all instructional errors on elements of an offense, harmonizes the vast majority of the case law (including all this Court's cases about instructional error on elements of an offense), and soundly reflects the values of due process and the defendant's right to a jury trial. The essence of that approach is as follows: to decide whether an instructional error on an element of an offense is harmless, a reviewing court must determine from what the jury *actually did* (the findings the jury made and the evidence it considered) what the jury *would have done* (i.e., whether it would still have convicted) if it had been correctly instructed.

We begin by explaining the approach, which we call a "jury-findings, evidence-considered" test. Section A. Next we apply the test to the case at bench. Section B. Finally, we review the *Kobrin* opinion and related Ninth Circuit authority to demonstrate the need for this Court to clarify this area of the law. Section C.

A. The Jury-Findings, Evidence-Considered Test: A Universal, Three-Step Approach To Analyzing Instructional Errors On Elements Of An Offense

1. Exactly What Was The Error?

Federal constitutional instructional error occurs if "'there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution. *Boyde v. California*, 494 U.S. 370, 380 (1990). [Footnote omitted.]" *Estelle v. McGuire*, 502 U.S. 62, 72 and n. 4 (1991). Because a harmless error analysis must be predicated upon evidence the jury considered, a reviewing court must determine from the instructions the jury received what evidence the jury in fact considered. *Yates v. Evatt*, 500 U.S. 391, 403-404 (1990). It likewise follows that the first step in a harmless error analysis is a foundational determination of exactly what the error was in the first place. That is, a reviewing court must determine not just *whether* the jury misunderstood the law but exactly *how* it did so and, hence, what evidence it considered and what findings it made.

2. Could The Error Have Been Harmless?

After having determined how an instruction caused a jury to misunderstand the law, a reviewing court next must inquire whether the error "could be harmless" or, conversely, whether the error is "reversible per se." The following is the test: given the jury's particular misunderstanding of the law, *could* the jury nonetheless have made findings and considered evidence that would establish that the jury would have made the requisite findings had it been properly instructed?

In conducting this inquiry, a reviewing court considers the offending instruction in relation to the statutory definition of the offense. A court does not delve into the record to discover what evidence was actually presented to the jury. So, for example, if a jury were instructed to find the defendant guilty if he has blue eyes and lives in the United States (see *Carella v. California*, 491 U.S. 263, 269 (1989) (Scalia, J., concurring)), the error would fail the "could be harmless" test because, given that instruction and the definition of the charged offense, the jury could neither make findings nor consider evidence that would establish that the jury would reach the required finding for conviction under a proper instruction.[1/]

3. Was The Error Actually Harmless?

If an error could be harmless, a reviewing court poses a third and final question: was the error actually harmless? The test is as follows: Given the jury's particular misunderstanding of the law, did the jury nonetheless actually make findings and consider evidence

---

1. Lest it be contended that the "could be harmless" test disqualifies only hypothetical errors, we note two recent California cases of per se reversible instructional error on an element of an offense: *People* v. *Corey*, 35 Cal.App.4th 717, 725-726 (1995) [selling a security by means of false statements or omissions (Cal. Corp. Code, § 25401) requires defendant's knowledge that the statement was false; jury instructed to determine only whether the defendant made the statements in question; jury told that evidence of defendant's knowledge irrelevant; both parties precluded from fully eliciting evidence on the issue; conviction reversed]; *People* v. *Jerry R.*, 29 Cal.App.4th 1432, 1440-1441 (1994) [in court trial of discharging firearm in grossly negligent manner (Cal. Pen. Code, § 246.3), trial court erroneously ruled that requisite mental state does not include intent to shoot; reversible error].

establishing that the jury would have made the requisite findings if it had been properly instructed?

When an instructional error (or the ruling of law that produces it) prevents a defendant from adducing substantial evidence on the element in question, a reviewing court cannot determine whether the jury, if it had considered such evidence, would have made the requisite findings for conviction. Accordingly, if the error prevents a defendant from adducing substantial evidence on the element in question, the error is not harmless. See *Rose v. Clark*, 478 U.S. 570, 579, n. 7 (1986) [an error that "affect[s] the composition of the record" creates "inherent difficulty in evaluating whether the error prejudiced the [defendant]. . . ."]

4. <u>The Basis Of The Jury-Findings, Evidence-Considered Test</u>

This three-part analysis reconciles the different harmless error formulations this Court has offered in instructional error cases. See *Rose v. Clark*, 478 U.S. at 580, *supra* [instructional error on element of an offense harmless if predicate facts found by the jury "conclusively establish" the element in question]; *Pope v. Illinois*, 481 U.S. 497, 503, fn. 6 (1987) [instructional error on element of offense harmless if "the facts found by the jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same"]; *Carella v. California*, 491 U.S. at 271, *supra* (Scalia, J., concurring) [instructional error on element of an offense harmless if "the predicate facts relied upon in the instruction, or other facts necessarily found by the jury, are so closely related to the ultimate fact to be presumed [i.e., the element] that no rational jury could find those facts without also finding that ultimate fact. . . ."]; *Yates*

v. Evatt, 500 U.S. at 403-405, *supra* [instructional error on element of the offense harmless if it did not contribute to the verdict, i.e, if the evidence considered by the jury overwhelmingly establishes the element]; *Sullivan v. Louisiana*, 508 U.S. ___; 113 S.Ct. 2078, 2082 (1993) [defective reasonable doubt instruction can never be harmless because without a true finding of guilt beyond a reasonable doubt reviewing court has no object on which to base a harmless error analysis].

B. The Jury-Findings, Evidence-Considered Test Applied To This Case

1. The Error

In this case, the trial court's error was straightforward: its instructions created not only a reasonable likelihood (*Estelle v. McGuire*, 502 U.S. at 72 and n. 4, *supra*) but a virtual certainty that the jury believed it could convict respondent of perjury without determining (or even considering) whether his allegedly perjurious statements were material.

2. The Error Could Have Been Harmless.

The error could have been harmless if the jury could nonetheless have made findings or considered evidence establishing that the jury would have found materiality had it been properly instructed.

To apply this test (and the "actually harmless" test as well), one must begin with the meaning of "materiality." Under California's perjury law, "materiality" in essence means "relevance": a statement is material if it "could have 'influenced the outcome of the proceedings.' [Citations.]" *People v. Hedgecock*, 51 Cal.3d 395, 405 (1990). See Cal. Penal Code, § 123

[statement may be perjurious even if defendant did not know the materiality of it or if it did not affect the proceeding; " . . . sufficient that it was material, and might have been used to affect such proceeding"]; *People v. Pierce*, 66 Cal.2d 53, 61 (1967) ["The test is whether the statement could probably have influenced the outcome of the proceedings. . . . "]; *People v. Matula*, 52 Cal.2d 591, 595 (1959) [". . . could reasonably influence the outcome of the proceedings"].

The proceeding in question here was an application for a driver's license. The "outcome of the proceeding" was the issuance of the license to "Jesse Willard." Therefore, each of respondent's statements was material if that statement could have influenced the Department of Motor Vehicles to issue the driver's license in the name of "Jesse Willard."

If respondent did aver in the application that his name was "Jesse Willard" and if the DMV did then issue a license in that name, it would be apparent from those two facts alone that the statement not only could have influenced but in fact did influence the DMV to issue the license in the name of "Jesse Willard" and, hence, was a material statement. Therefore, if the jury could have found or considered overwhelming evidence that respondent gave his name as "Jesse Willard" in the driver's license application and that the DMV then issued a driver's license to "Jesse Willard," the instructional error could have been harmless because the jury could have made findings or considered evidence establishing that under proper instructions it would have found the false-name statement to be material. To determine whether the error could have been harmless, then, it remains only to determine whether, under the instructions it received, the jury could in fact have made findings or considered overwhelming evidence that

respondent gave his name as "Jesse Willard" and that the DMV then issued a license in that name.

The false-name statement was one of the three statements on which the perjury charge was based, and the jury was instructed to determine whether any of the allegedly perjurious statements was made by respondent with the requisite intent. Accordingly, the jury could have considered evidence that respondent made that statement; indeed, the jury necessarily considered such evidence.

The jury also could have considered evidence that the DMV issued the driver's license to "Jesse Willard." To prove that it was respondent who made the false-name statement (and/or that he did so with the intent to falsify), the prosecution had to show that respondent was trying to appear to be "Jesse Willard." Accordingly, the prosecution could have adduced (and the jury would then have considered) evidence that respondent not only applied for but used a driver's license in the name of "Jesse Willard." Such proof necessarily would have entailed the foundational showing that the DMV issued a license to "Jesse Willard." We conclude that the jury could also have considered evidence that the DMV issued a license to "Jesse Willard."

3. The Error Actually Was Harmless.

As it happened, the evidence that respondent made the false-name statement was not overwhelming. By asserting that someone else had filled out the application for him and by at least implying that he did not authorize that act, respondent presented substantial evidence that he did not in fact make the statement (or the other two allegedly perjurious statements). However, the jury necessarily found that respondent made the false

statement. Respondent's "someone else did it" defense applied equally to all three allegedly perjurious statements. Accordingly, the jury could not have convicted respondent of perjury, as it did, without rejecting that defense and finding that he did in fact make the three statements. Likewise, the record establishes that the jury in effect found that respondent made the false-name statement.

On the question of whether the DMV issued the license in the false name, the evidence *was* overwhelming. The false license was admitted into evidence (People's Exh. 69a), the prosecution showed that, among other things, respondent had used it to purchase guns (RT 796, 803-804, 807-809; People's Exhs. 70a, 70b), and respondent himself admitted its existence. See RT 2423-2424 [respondent accepting prosecutor's repeated assertion that respondent got "a perjured license"]; RT 2427-2728 [false license was mailed to him at an address in Sunnyvale, not Vallejo]; RT 2436 [acknowledging that he signed the false driver's license]. Moreover, the jury would necessarily have considered evidence that the false license issued because, as explained above, the issuance of the license provided the foundation for a showing that respondent used such a license, which supported an inference that he intended to present himself as "Jesse Willard," which in turn supported an inference that he had reason to make the false statements in the application, which in turn tended to show that he did in fact make those statements with the requisite intent.

In sum, the findings the jury made and the evidence it considered regarding the making of the false-name statement and the issuance of the false license established that, had it been properly instructed, the jury would have found the false-name statement to have been material with regard to the issuance of the license.

Accordingly, the error not only could have been harmless but actually was harmless.

C. By Granting Certiorari, This Court Can Correct Basic, Widespread Errors In The Way Reviewing Courts Analyze Whether An Instructional Error On An Element Of An Offense Is Harmless.

This case is an unpublished opinion by a California Court of Appeal. It includes only a perfunctory treatment of the harmless error question. However, the opinion reflects a misunderstanding of the law that has now become the rule rather than the exception in California state courts (*People v. Kobrin*, 11 Cal.4th at 428-430, *supra*) and in the Ninth Circuit as well. *United States v. Gaudin*, 997 F.2d 1267, 1272 (9th Cir. 1993). *Kobrin* both exemplified the misunderstanding and established it as the law in California. Accordingly, we turn to that case to show how, by granting certiorari in this case, the Court can clear up the confusion in this area of the law.

In *Kobrin*, the California Supreme Court dealt with the question of harmless error in the context of the same erroneous instruction that was given in this case. Although *Kobrin* left open the possibility that what it called an "omitted instruction" could be harmless error, the court expressly declined to set forth a test under which such an error (which it did not define) would actually be harmless. *People v. Kobrin*, 11 Cal.4th at 428, n. 8, *supra*. Instead, the court held that for three reasons the error in that case was not harmless. *Id.* at 428, n. 8; and 428-430. In this respect the opinion is at least partly self-contradictory. It professes not to set forth a harmless error test (*id.*, at 428, n. 8), yet in

stating three reasons why the error was not harmless it establishes those three reasons as a de facto test. Two of those reasons are conclusory labels. Subsections 1 and 2. The third reason is the sound principle that an instructional error on an element of an offense is not harmless if it prevented the defense from adducing substantial evidence on the element in question. However, that factor is not present in most cases and, hence, of limited use. More importantly, *Kobrin* failed to explain how to determine whether in fact the instructional error has prevented the defense from adducing substantial evidence on the element in question. Subsection 3.

1. The Flawed "Error Characterization" Approach

Kobrin found the instructional error to be prejudicial first because "the jury's findings on materiality were not merely imperfect . . . [but] nonexistent due to the instructional omission." *Id.* at 429. This purported rationale merely restates the problem in answer form. Problem: may a flawed instruction on an element of an offense be harmless if it prevents the jury from making a finding on the element in question? Nonanswer: a flawed error on an element of an offense is not harmless because it prevents the jury from making a finding on that element.

To reach this conclusion, the court misinterpreted *Sullivan v. Louisiana*. *People v. Kobrin*, 11 Cal.4th at 428-429, *supra*. *Sullivan* held that a flawed reasonable doubt instruction may never be harmless error. It explained:

> "There being no jury verdict of guilty-beyond-a-reasonable-doubt, the

> question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate." *Sullivan v. Louisiana*, 508 U.S. at ___; 115 S.Ct. at 2082, *supra*. (Emphasis in the original.)

This passage makes clear that the "object . . . upon which harmless scrutiny can operate" is a jury verdict of guilty beyond a reasonable doubt. The jury returned such a verdict in *Kobrin* (and in this case). Nothing in *Sullivan* states or suggests that an instruction that prevents a jury from making a finding on an element also deprives the reviewing court of a jury verdict of guilty beyond a reasonable doubt and, hence, of the "object upon which harmless error scrutiny can operate." *Ibid.* Yet without explanation *Kobrin* held that the erroneous instruction on materiality did precisely that. *People v. Kobrin*, 11 Cal.4th at 429.

Kobrin in effect establishes in California an "error characterization" approach to harmless error. The Ninth Circuit adopted a similar approach in *United States v. Gaudin*, 997 F.2d at 1272, *supra* (hereafter "*Gaudin I*"), reaffirmed it in *United States v. Gaudin*, 28 F.3d 943, 944 (9th Cir. 1994), (hereafter "*Gaudin II*"), and followed it in at least three more cases: *Harmon v. Marshall*, 57 F.3d 763, 765 (9th Cir. 1995); *United States v. Hove*, 52 F.3d 233, 238 (9th Cir. 1995); and *United States v. Stein*, 37 F.3d 1407, 1410 (9th Cir. 1994). Under this approach, a reviewing court must classify an instructional error as one of two types. It can be one that "removed" or "omitted" an element, or it can be one that merely

"misstated" an element, either by misdefining it or by erroneously lightening the prosecution's burden of proof through a rebuttable or conclusive presumption. If the error is of the "removed" or "omitted" type, it is either per se reversible (see *Gaudin II*, 28 F.3d at 951, *supra*; *Gaudin I*, 997 F.2d at 1272, *supra*) or, as per *Kobrin*, 11 Cal.4th at 428-429 and n. 8, *supra*, subject to a stringent harmless error test in which the error must be found prejudicial unless the jury found the element under another, proper instruction. If the error merely "misstates" an element, a reviewing court is free to decide harmlessness by examining the evidence the jury considered and the findings it made. See, e.g., *Rose v. Clark*, 478 U.S. at 580-582, *supra* [rebuttable presumption harmless if predicate facts found by the jury establish element in question]; *Pope v. Illinois*, 481 U.S. at 500-501; 503, n. 6; 504, *supra* [misdefined element would be harmless if facts found by the jury establish that the jury would have convicted absent the erroneous instruction]; *Carella v. California*, 491 U.S. at 2266-267, *supra* [conclusive presumption instruction harmless if harmless under *Rose* and *Pope*].

The error characterization approach rests upon a chimerical distinction, as this case demonstrates. The jury was told to find the "materiality" element of the offense if it found that respondent made any of the statements as charged. One could (as *Kobrin* does) characterize this instruction as one that told the jury not to consider the "materiality" element and, hence, as one that "removed" that element from the jury. But with equal validity, one could characterize the instruction as one that merely "misstated" the materiality element -- establishing a conclusive presumption that the prosecution proved materiality if it proved the other elements of the crime. Indeed, virtually any instruction that can be said to "remove" an element can with equal

validity be said merely to state a conclusive presumption. One simply characterizes as predicate facts the factual issues the jury did resolve and then adds the missing element as the conclusion in the conclusive presumption. In sum, the "error characterization" approach collapses the very distinction it purports to establish between instructions that are reversible per se because they "remove" elements and instructions that could be harmless because they merely "misstate" elements.

The Ninth Circuit has now sought to clarify its error characterization approach, recasting "omitted element" instructions as akin to misstated elements and erroneous presumptions and, hence, subject to harmless error analysis, while continuing to find so-called "removed elements" reversible per se. *Roy v. Gomez*, ___ F.3d ___; 1996 U.S. App.LEXIS 7715, 7123-7126 (9th Cir. 1996). According to *Roy*, an instruction removes an element "from the jury's purview" when it states that the element has been established as a matter of law, as the instructions did in *Gaudin* (*id.*, at 7124) and *Kobrin*. By contrast, an instruction that "omits" an element "simply fails to alert the jurors they must consider it." *Id.* at 7125. In the latter case but not the former, the jury can still "necessarily find" the element, which would render the error harmless. *Ibid.* Accordingly, an "omitted" element, like a misstated element or an erroneous presumption, is subject to harmless error analysis, whereas a removed element is not. *Ibid.* and n. 3.

Roy's approach fails first of all because, like *Kobrin* and *Gaudin*, it rests on the assumption that the essence of harmless error analysis is only what the jury actually did under the instructions it received and not also what the jury would have done under proper instructions. *Roy* bases this approach on a single sentence from Justice Scalia's concurrence in *Carella*. (*id.* at 7123, citing *Carella*, 491 U.S. at 271, Scalia, J.,

concurring [error harmless if no rational jury could find the predicate facts forming the basis for the presumption without also finding the presumed fact]. *Roy* fails to note the ambiguity in Justice Scalia's statement, takes the statement out of context, attributes a meaning to it that conflicts with this Court's other harmless error formulations, and ignores the fact that the *Carella* concurrence was only a concurrence, not the decision of this Court.

Most damningly of all, *Roy* itself undermines its "necessarily found" definition of harmless error by applying a contrary standard. In *Roy*, the jury was instructed that it could convict the defendant as an aider and abettor if it found that he knew about the principal's criminal purpose. *Roy v. Gomez*, 1996 LEXIS at 7120, *supra*. The instruction was erroneous because it failed to warn the jury not to convict without finding that the defendant also *intended* to aid the principal's criminal purpose. *Ibid.* After finding that the error could be harmless (because it merely omitted rather than removed an element) (*id.*, at 7123-7126), *Roy* decided that the error was actually prejudicial because *the evidence of* intent was insufficiently strong. *Id.* at 7127-7131. Thus, instead of deciding harmlessness by focusing solely on what the jury necessarily found, *Roy* really decided a different question without saying so: whether, given the evidence the jury considered (and, perhaps, its finding of knowledge), the jury *would have* convicted had it been properly instructed. In sum, *Roy* announced a "necessarily found" test only to abandon it in favor of a standard more akin to our jury-findings, evidence-

considered test -- a sure sign that the announced standard is at best suspect.[2/]

A test of what the jury would have found had it been properly instructed, as opposed to what it necessarily did find under the instructions it received, can be applied with equal reliability to "removed" as well as "omitted" elements. Accordingly, there is no reason to make the former type of error reversible per se and the latter possibly harmless, as the Ninth Circuit has done.

Moreover, even if one were to apply a real "necessarily found" test, there is still no reason to distinguish between the two types of error. Suppose the prosecutor charges that, though only an aider and abettor, the defendant used a gun in the commission of the crime, and the jury finds the gun use allegation to be true. In such a case, the gun use finding might be said necessarily to include within it a finding that the defendant had the requisite intent for aiding and abetting. Accordingly, it would not matter if the aiding and abetting instructions were erroneous by failing to mention intent ("omitted element") or by telling the jury that the prosecution had proved that element if it proved knowledge ("removed element").

In sum, *Roy* utterly fails to explain why mentioning an element but telling a jury not to decide it is necessarily any worse than not mentioning it at all. Because the distinction between "removed" and "omitted" elements is just as empty as the one between "removed" and "misstated" elements, *Roy* will promote the same sort of meaningless characterizations that (as *Roy* itself demonstrates) *Gaudin* and *Kobrin* have begun. Defendants will characterize instructional errors as having

---

2. By asserting that *Roy* applied a standard akin to the correct one, we do not imply that it did so correctly -- i.e., that it was correct in finding the instructional error prejudicial.

prevented the jury from making a finding on an element and will use that characterization to conclude that the errors were prejudicial irrespective of the evidence the jury considered or the findings it made. The state will characterize the same errors as having merely misstated the elements in question and will use *those* characterizations to conclude that the reviewing court may look to the evidence and the jury's findings to determine harmlessness. Because the difference between the two categories is at best elusive, reviewing courts will render their decisions (as the courts did in *Kobrin*, *Gaudin I* and *II*, and *Roy*) by choosing a label rather than by analyzing the problem.

2. <u>The "Element In Mind" Notion</u>

Kobrin offered a second reason for finding its instructional error prejudicial:

> " . . . we have no basis for determining the extent to which [the jury's findings] reflect a consideration of whether defendant's false statements were material since the only reference to the [materiality] issue specifically removed it from the deliberative process. [Citations omitted.] Given the complete failure to instruct on materiality, i.e., to have the jury assess the evidence in relation to *that* element of the offense, a finding of harmless error would rest solely on conjecture, effectively substituting this court for the jury as the trier of fact." *People v. Kobrin*, 11

> Cal.4th at 429. (Emphasis in the original.)

This passage closely resembles one in *Gaudin I*. In that case, the Ninth Circuit rejected the state's contention that the jury considered overwhelming evidence of materiality in finding the other elements of the perjury:

> " . . . when an element of the crime has been completely removed from the jury's determination, there can be no inquiry into what evidence the jury considered to establish that element, because the jury was precluded from considering the element at all. The fact that evidence existed, which the jury *could have considered* [original emphasis] on the issue of materiality had the issue been submitted to the jury under an appropriate instruction, is of no moment, because the jury was instructed not to consider the evidence *as to* materiality. [Emphasis added.] Thus, simply stated under *Yates*, when an element of the crime that must be found by the jury is removed from the jury's consideration, that error cannot be harmless. [Footnote omitted.]"

In these passages, both *Kobrin* and *Gaudin* assume that a jury's failure to consider evidence *with the element in question in mind* prohibits and prevents a reviewing court from determining what the jury would have done had it been properly instructed. That assumption is flatly and demonstrably incorrect.

In *Pope*, the jury found certain material to be obscene by finding that it lacked redeeming value under a statewide standard. *Pope v. Illinois*, 481 U.S. at 499, *supra*. The jury was not instructed upon and, hence, never considered the proper issue -- whether the material lacked redeeming value under a reasonable person standard. *Id.* at 500-501. Nonetheless, this Court found that the error would be harmless if the evidence the jury considered was such that the jury would have found obscenity under a correct instruction. *Id.* at 503, n. 6; 504.

In sum, there simply is no valid "element in mind" or even "issue in mind" rule. What matters is not whether the jury properly conceptualized the findings it made or the evidence it considered but, rather, what its misconceptualized findings and the evidence it considered show about what the jury would have found had it been properly instructed.

3. The Principle That An Instructional Error Is Not Harmless If It Prevented The Defense From Adducing Substantial Evidence On The Element In Question

Finally, *Kobrin* found the instructional error prejudicial because it "may have affected the record. . . ." *People v. Kobrin*, 11 Cal.4th at 429-430, *supra*. "In refusing to instruct the jury on [materiality], the trial court concomitantly rejected the [proffered defense] evidence [on materiality] as inadmissible." *Id.* at 430.

In reaching this conclusion, the court failed to mention what the proffered defense evidence was. Accordingly, it failed to offer any guidance as to how one can determine whether an instructional error may have affected the record. This is not necessarily an easy determination to make.

Although the opinion in *Kobrin* provides no evidence of it, the California Supreme Court got it wrong. The defense had offered to show that true statements by the defendant, rather than his false ones, may have been the basis for the decision in the proceeding in question (the issuance of a temporary restraining order). The defense claimed that such a showing, if accepted by the jury, would preclude a finding that the false statements were material. The defense was incorrect. To prove materiality, the prosecution had to show only that the defendant's false statements were possibly influential in the decision, not that they were the basis for it. Accordingly, the proffered defense evidence was simply irrelevant. Likewise, by deciding the issue of materiality itself and by preventing the defense from adducing its evidence, the trial court did not affect the record in any significant way. It simply did the right thing: it excluded irrelevant evidence.

We cannot and do not ask this Court to look behind the published opinion in *Kobrin*. We have done so only to demonstrate that the meaning of the "may have affected the record" principle can be misinterpreted. It follows that by relying on but failing to explain that principle *Kobrin* offers no assurance that reviewing courts will use the principle correctly and, hence, do correct harmless analyses even in those cases in which the principle may apply.

4. Summary

Kobrin was two-thirds wrong, one-third opaque, and altogether instructive. It (like *Gaudin I* and *II*, *Roy*, and the other cited Ninth Circuit cases) demonstrates the difficulties courts face in grappling with the confusing doctrine of harmless error. An offshoot of *Kobrin*, this

case offers an instrument with which this Court can dispel the confusion.

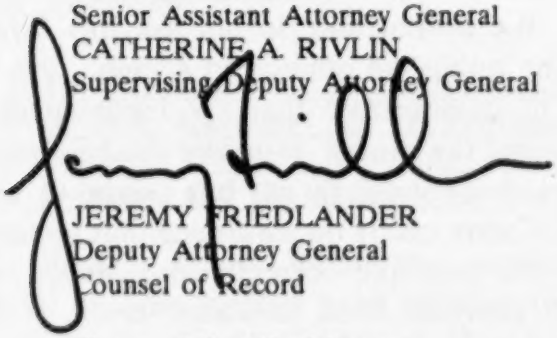
CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: May 17, 1996.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
CATHERINE A. RIVLIN
Supervising Deputy Attorney General



JEREMY FRIEDLANDER
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

JF:er
SF96US0004

APPENDIX A

APPENDIX A

NOT CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

vs.

JESS RODERICK MITCHELL,

Defendant and Appellant.

H012785

(Santa Clara County Super.Ct. Nos. 164364 168432)

Defendant Jess Roderick Mitchell was charged by information with robbery (Pen. Code, §§ 211, 212.5, former subd. (b) [now subd. (c)]; count 1),[1] attempted murder (§§ 664, 187; count 2), assault with a firearm (§ 245, subd. (a)(2); count 3), auto theft (Veh. Code, § 10851; count 4), possession of stolen property (§ 496; count 5), fraudulent use of an access card with intent to defraud (§ 484g; count 6), carrying a concealed weapon in a vehicle with a prior weapons violation (§ 12025, subd. (a); count 7), two counts of carrying a loaded firearm in a vehicle (§ 12031, subd. (a); counts 8 and 9), and perjury in applying for a driver's license (§ 118;

1. Further statutory references are to the Penal Code unless otherwise indicated.

count 10). The information further alleged that defendant was armed with a firearm.

Defendant waived his right to counsel and asked the court that he be allowed to represent himself. The court initially denied defendant's request, but then granted it.

Subsequently, codefendant Calvin Russell, who had earlier pleaded not guilty, changed his plea and entered a guilty plea. Russell then testified against defendant.

The jury found defendant guilty as charged, and also found true the enhancing allegations.

The court sentenced defendant to a total term of 14 years in state prison, as follows: the upper term of 9 years for attempted second degree murder; consecutive one-third midterms of 1 year for robbery; and 8 months each for auto theft, possession of stolen property, and carrying a concealed weapon in a vehicle. Sentences for assault with a firearm and fraudulent use of access card were stayed pursuant to section 654. A one-year enhancement for the arming finding was imposed.

We affirm in part, reverse in part, and remand for resentencing.

FACTS

The June 9, 1992 Incident

Russell met defendant in Houston, Texas in 1991. Defendant had driven there in a van with several other people. Russell testified that defendant's purpose in going to Texas was to rob drug dealers, and that in one $80,000 drug dealer robbery, Russell had provided important information to defendant, although Russell did not actually go with defendant to commit the robbery.

Russell came to California in early 1992. After staying with his cousin-in-law for a couple of days, Russell moved into defendant's house in Milpitas.

Russell had been a "street hustler" in Texas since he was nine years old. Russell defined a "street hustler" as "a person that revenues or make [sic] money by the

streets," mostly "in an unlawful manner." The numerous ways that a street hustler "revenues money" include "gambling, selling drugs, stealing cars and selling them, doing robberies, pimping 'hos and all of that."

One criminal activity Russell had concentrated on was "Rolex watch robbery." Asked why, Russell explained: "It's a fast way to make money quick. It's a lot less victims being involved. It's a lot less anybody getting hurt. It's just easy. It's easy to do because it's only one thing that we are after and one person basically possesses it. [¶] So in other words, it's different than going into a store to rob a grocery store where you got a gang of people working. When you do a Rolex robbery, you just get one item and you cash it in and get paid."

Russell also explained why the best time to commit a Rolex robbery was during the day: "[F]or one reason, it's kind of hard to do a Rolex robbery at night unless you specifically know a person owns a Rolex. And two, . . . I don't believe in doing crime at night. . . . [¶] [] From the street knowledge that I have learned . . . it's easier to do work in the daytime because the police ain't going to be just really looking for you . . . in the heat of the day and it's very unexpected to everybody because the person that owns the Rolex don't even know it's coming and the police really doesn't have no idea of that type of robbery." Also, it is best to commit a Rolex robbery "when the freeways are crowded with congested traffic," "[b]ecause that's where you find the Rolex watches in the traffic. People riding, they -- some of them drive with their arms on the window like this or some have a hand on the steering wheel like this and they just easily visible from basically 20, 30 feet."

Russell testified that on the morning of June 9, 1992, he and defendant left defendant's house to commit a Rolex robbery. They drove a Ford Escort belonging to

one of defendant's friends. They picked up a third companion, Eugene Jackson (hereafter, Eugene), in East Palo Alto. As they were driving on a freeway going to San Jose, they spotted Patrick Jackson (hereafter, Jackson) driving a 1981 Mercedes Benz, wearing what appeared to be a Rolex watch. They followed Jackson, who exited I-280 at Stevens Creek and proceeded to a CompUSA store. Eugene stepped out of the Ford Escort to ascertain whether Jackson's watch was a genuine Rolex. Eugene approached Jackson and asked him for the time. Jackson looked at his watch, and in so doing exposed it to Eugene. Eugene went back to the Ford Escort and told Russell and defendant that Jackson's watch was a genuine Rolex.

Russell's group followed Jackson to Hunter Properties in Cupertino. Russell and defendant got out of their car to approach Jackson. Eugene stayed in the car. Defendant asked Jackson to give him his watch. Jackson refused, and the two fought. Russell went to Jackson, put a gun in Jackson's face, and asked Jackson: "Do you want some of this." Jackson said no, and gave up his watch. Russell asked for Jackson's wallet. As Jackson was reaching for his wallet, Regina Morella walked out of the Hunter Properties building. Morella asked what was going on. Russell told Morella to mind her own business. When Morella "said something again," Russell shot her. Morella was hit and suffered serious injuries, but did not die.

The May 13, 1992 Incident

On May 13, 1992, Dr. Jay Hann, a hand surgeon, drove his 1982 Oldsmobile Toronado to the Veterans Administration Hospital in Palo Alto. Inside the trunk of the car were valuable micro surgical instruments.

Russell testified that on that day he and defendant drove Stacy Wade, defendant's niece, in a van to the hospital so that Stacy could visit her boyfriend. While

Russell and defendant were in the hospital parking lot, they decided to steal a car. Russell looked for a car that was easiest to steal, and found Hann's Toronado. Using a screwdriver, Russell opened the Toronado's window. He then entered the car and started the engine. Russell asked defendant to drive the car because he (Russell) was "not familiar with the area," and did not know which way to go if he had "to run from the police." Defendant drove the Toronado, and Russell followed him in the van.

The September 8, 1992 Incident

On September 8, 1992, Reza Mirshafiei, who was in the business of buying and selling used cars, was driving a Lexus which he had purchased from a private party to resell. The seller had given him spare keys to the car; one key opened all doors. Mirshafiei testified that he had placed his briefcase inside the trunk of the car, and might have inadvertently left the key he used to open the trunk in the trunk lock. Inside the briefcase were Mirshafiei's checkbooks, company checks, credit cards, and business records.

Russell testified that on that day, while he and defendant were out looking for Rolex watches, he saw a Lexus with a key in the trunk lock. He told defendant, who was driving, what he saw. Russell and defendant followed the Lexus to an auto dealer's auction. Defendant went to the Lexus, opened the trunk, and took the briefcase.

Defendant suggested using the credit cards. Russell initially opposed the idea because using other people's credit cards was not one of his "hustles"; however, Russell eventually went along. Defendant, Russell, and Stephanie Crouts drove to the Zenith Wire Wheel Company (hereafter Zenith). Russell and Crouts went inside the store and ordered wheels and tires for Russell's car. They paid for the items with one of the

credit cards, but were told to pick up the merchandise later because the shop had to make an adapter for the rims.

James Craig, the owner of Zenith, was suspicious about Russell's appearance because it did not match the ethnicity suggested by the name on the credit card. Craig called a credit card security agency and the Campbell Police.

When defendant, Russell, and Crouts returned to Zenith later in the day, the police were waiting for them. The trio turned back, but were stopped by the police at Harrison Avenue. The police searched the van. Among the items found was a Glock 9mm semiautomatic handgun.

False Identity

Investigation by the police revealed that one person had applied for driver's licenses under two names: Jess Willard and Jess Mitchell. The fingerprints on the license applications matched the booking fingerprints of defendant. During his testimony, defendant admitted that the Willard application was also his, and that he submitted it to obtain a false driver's license. Defendant used the Jess Willard driver's license for identification when he purchased his handguns.

CONTENTIONS

Defendant contends:

1. The trial court erred in failing to revisit the Faretta[2] question when Russell pled guilty and agreed to testify for the prosecution.

2. The trial court committed reversible error in failing to warn defendant before he testified of his privilege against self-incrimination.

---

2. Faretta v. California (1975) 422 U.S. 806.

3. The trial court erred in admitting evidence that defendant had pled guilty, and by instructing that defendant was an accomplice as a matter of law, without also instructing that defendant's guilty plea was not independent evidence that he was guilty.

4. The trial court erred in giving unmodified CALJIC No. 2.11.5, thereby minimizing an important aspect of the careful scrutiny to be given Russell's testimony.

5. The trial court erred in admitting evidence of a crime, unrelated to the current charges, which Russell claimed defendant had committed in Texas in 1991.

6. The trial court impermissibly restricted defendant's ability to impeach Russell regarding Russell's legal problems in Texas and their effect on his role as a witness for the prosecution in this case.

7. Count 6 must be reversed because the trial court failed to instruct on an essential element of the offense; if not reversed, the count 6 conviction must be reduced to a misdemeanor.

8. The trial court erred by instructing that certain statements were material as a matter of law in regard to the perjury charge in count 10.

9. Because the amount of the restitution fine is not supported by the record, the case must be remanded for a hearing on the issue, or the fine must be reduced to the statutory minimum.

DISCUSSION

No Error in Failure to Revisit Faretta Question

Defendant contends the trial court erred in failing to revisit the Faretta question when codefendant Russell pled guilty and agreed to testify for the prosecution. We disagree.

Approximately one month after defendant had elected to represent himself, Russell, who was represented by the public defender, pled guilty and

agreed to testify for the prosecution. Defendant claims that Russell's decision to plead guilty and testify for the prosecution constituted a "drastic increase in the risks of self-representation for defendant," and hence the trial court "should have inquired of Mr. Mitchell whether he wanted to reconsider his decision to represent himself under these new and eminently more hazardous circumstances."

Defendant cites no authority for the proposition that increase in the risks of self-representation is a ground to revisit the Faretta question. We think the proposition is unacceptable. Were we to accept the proposition, the question would be revisited each time a pro se defendant would make a mistake that would substantially increase the probability of his or her conviction. As this could happen innumerable times over the entire course of a criminal proceeding, revisiting the question as often would impose on the court a requirement that serves no constitutional or useful purpose.

In People v. Poplawski (1994) 25 Cal.App.4th 881, 889, this court held that the Faretta election of self-representation is valid and binding on a defendant for the rest of the proceedings if made competently, knowingly, intelligently, and voluntarily. We stated that "the only valid reasons for revoking a defendant's pro se status are disruptive in-court conduct or substantial evidence of incompetency." (Ibid.) None of the excepted situations is present here.

Defendant relies on language in U.S. v. Fazzini (7th Cir. 1989) 871 F.2d 635, 643 (hereafter, Fazzini), which states: "Once the defendant has knowingly and intelligently waived his right to counsel, only a substantial change in circumstances will require the district court to inquire whether the defendant wishes to revoke his earlier waiver." Defendant argues that "[a] more substantial change in circumstances than that which befell

Mr. Mitchell in this case is difficult to imagine." The reliance is misplaced.

First, Fazzini in fact rejected the "substantial change" argument in that case. Second, Fazzini is factually distinguishable. In Fazzini, the defendant disputed that he ever waived his right to counsel. Indeed, the Fazzini court noted that "the record shows that the defendant never clearly stated that he waived his right to counsel. Instead, on several occasions, the defendant insisted that he was being forced to proceed pro se by the court and would have preferred to have new counsel appointed." (871 F.2d at p. 642.) Nevertheless, stating that "it is not necessary that a defendant verbally waive his right to counsel," the Fazzini court found that the defendant's actions in that case had the "effect of depriving himself of appointed counsel" and "establish[ing] a knowing and intentional choice." (Ibid.) Because the defendant had implicitly waived his right to counsel, Fazzini held that the court was not required to inquire of the defendant if he wanted to be represented by counsel at sentencing. (Ibid.) It was in the context of rejecting the defendant's claim that "it is incumbent upon the judge to ensure that at each critical phase of the proceedings, the defendant is asked whether he wishes to continue without counsel," that the court stated that "[o]nce the defendant has knowingly and intelligently waived his right to counsel, only a substantial change in circumstances will require the district court to inquire whether the defendant wishes to revoke his earlier waiver." (Id. at p. 643.)

It is thus plain that the weight of the evidence against the defendant or the complexity of the issues is a not factor to consider in granting or denying a defendant's Faretta requires of self-representation. All that is required is that the defendant "'knowingly and intelligently'" waive his or her right to counsel. (Faretta v. California, supra, 422 U.S. at p. 835.) As stated in

Faretta: "We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on voir dire. For his technical knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself." (Id. at p. 836, fn. omitted.)

We conclude the trial court did not err in failing to revisit the Faretta question after Russell's change of plea and agreement to testify for the prosecution.

No Failure to Warn Against Self-incrimination

Defendant contends the trial court committed reversible error in failing to warn him before he testified of his right against self-incrimination. The contention is without merit.

The transcript of the Faretta hearing reveals that the trial court repeatedly advised defendant in the strongest terms possible against self-representation, warning him that he would be up against an experienced prosecutor who would be determined to convict him. Further, the court specifically advised defendant that he had a right to remain silent and to not testify; that if he testified, he waived all immunity and his privilege against self-incrimination, and hence could be cross-examined, and anything he might say could be used against him.

The following colloquy demonstrates the sufficiency of the trial court's advice and warning: "THE COURT: Now, Mr. Mitchell, it's one thing to be an intelligent person and have verbal skills. The woods are full of those people. But to step into here, it would be like me, for example, putting the pads on you and say go up and play wide receivers for the 49er's, not knowing the play book, not having worked out, not being in shape and go out there over the middle, I want you to catch a pass. I want to tell you Lawrence Taylor is there waiting for you. This is what Mr. Hood [the prosecutor] is. He's

Lawrence Taylor waiting over the middle for you to come across and catch the ball. His interest is to put your lights out, legally speaking. [¶] Now, if you want to jump into that mess, you can do it, it's your call. But you've never been down this path before. Watching it on television, talking to other people and saying to yourself, if I'm going to fall, I'm going to do it the hard way. I'm going to represent myself. I'm going to try to make every motion I can. I'm going to try to make a record for appellate purposes so that when it's appealed, it's reversed. That's kind of throwing in the towel. That's saying, I know I'm going to be convicted, but I hope it gets reversed two or three years later. That's a big gamble. . . . [¶] Now, have you had -- in your college courses, have you taken classes, for example, in public speaking or business law or anything like that?

"DEFENDANT MITCHELL: No, sir. I was an electrical engineer.

"THE COURT: All right. Well, then, you should be familiar then with the term 'force is mass times acceleration.' And the force with which you get hit in this case is going to be a big mass at high speed. That's going to be the D.A.'s case with his experience. [¶] Now, I can't protect you on objections. I can't protect you when you ask a question, he objects, and you don't know how to ask a question. I can simply sustain it. I can't give you direction how to ask the question. that's one of the most difficult things for persons who represent themselves to do. How to ask a witness a question so that they can get the truth out of it and not testify as they want to. Coupled with the fact if you do testify, anything you say can or will be used against you. You don't have to be forced to testify. You have the right to remain silent."

Later in the Faretta hearing, after defendant had insisted on self-representation despite the court's advice

to the contrary, the court called codefendant Russell and his counsel, and discussion abut the potential consequences in the event defendant decided to testify ensued: "MS. BERNADINI [Russell's counsel]: Your Honor, you also might imagine what would happen if Mr. Mitchell wanted to testify. If Mr. Mitchell choose [sic] to testify and overlapping evidence is presented by the District Attorney, he can be cross-examined on a case which he is represented by Mr. Furst --

"THE COURT: Right.

"MS. BERNADINI: -- where the evidence is the same.

"THE COURT: And I'm sure Mr. Furst would say to him, I advise you not to testify and refuse to answer those questions. Once he takes the stand and says anything to anybody on direct, he waives all immunity and waives his privilege against self-incrimination. [¶] [] Mr. Mitchell, let me ask you one or two questions. Do you intend to go forward with your case in municipal court, attempted murder charge, and represent yourself on that case? You see what the problem is, Jess?

"DEFENDANT MITCHELL: I see it, yes, sir."

On this record, we are persuaded the trial court adequately advised defendant of his right against self-incrimination prior to defendant's taking the witness stand, and that defendant took the witness stand knowing that by doing so he was waiving his privilege against self-incrimination.

No Error in Admitting Evidence That Codefendant had Pled Guilty

Defendant contends the trial court erred in admitting evidence that Russell had pled guilty and instructing that Russell was an accomplice as a matter of law, without also instructing that Russell's guilty plea was not independent evidence that defendant was guilty. The contention is without merit.

The rule is settled that "[a] trial court is required to instruct sua sponte only on those general principles of law that are closely and openly connected with the facts before the court and necessary for the jury's understanding of the case. [Citation.]" (People v. Price (1991) 1 Cal.4th 324, 442.) The issue of the limited admissibility of evidence is not such a general principle of law. In People v. Collie (1981) 30 Cal.3d 43, 63, the court stated: "Although the trial court may in an appropriate case instruct sua sponte on the limited admissibility of evidence of past criminal conduct, we have consistently held that it is under no duty to do so. [Citations.]"

The fact that a defendant is pro se does not alter the rule. "The general rule is that a self-represented defendant is not entitled to any assistance or advice from the trial judge on matters of law, evidence or trial practice. [Citations.]" (People v. Jones (1992) 2 Cal.App.4th 867, 873.)

Here, defendant did not object when Russell testified that he (Russell) had pleaded guilty to the same crimes that were also charged against defendant. Likewise, defendant did not request a limiting instruction that would have informed the jury that Russell's guilty plea was not independent evidence of defendant's guilt.

We hold that defendant's failure to object and to request a limiting instruction waived the issue and precludes defendant from raising it for the first time on appeal.

Any Error in Giving CALJIC No. 2.11.5 is Waived

Defendant contends the trial court erred in giving unmodified CALJIC No. 2.11.5, which instructed the jury that it should not discuss or consider the reasons why a person other than the defendant was not being prosecuted. While conceding that the instruction was proper as applied to Eugene, defendant argues it was

erroneous as applied to Russell because its effect was to direct the jury that it could not consider Russell's plea bargain in evaluating Russell's credibility. We disagree.

In People v. Sully (1991) 53 Cal.3d 1195, 1218, where it was contended that CALJIC No. 2.11.1, although properly given based on the evidence, was too general to the extent it could be viewed as applying to the appellant, who was a prosecution witness, but where no request was made for a limiting instruction, the court, in holding that appellant had waived any assignment of error, stated: "'A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.'" (Citation omitted.)

Here, since defendant did not request an appropriate limiting instruction below, he is therefore precluded from claiming error on appeal. Again, "a self-represented defendant is not entitled to any assistance or advice from the trial judge on matters of law, evidence or trial practice. [Citations.]" (People v. Jones, supra, 2 Cal.App.4th at p. 873.)

No Error in Admitting Evidence of Texas Crimes

We also reject, for lack of merit, defendant's contention that the trial court erred in admitting evidence of a crime unrelated to the current charges which Russell claimed defendant had committed in Texas in 1991.

During his examination in chief, Russell testified that he first met defendant in Houston, Texas when defendant, in the company of other persons, was there for a visit. Apart from asking Russell when and where he first met defendant, with whom defendant was with, and how defendant came to Texas, the prosecutor did not ask Russell anything else about defendant's contacts or activities in Texas.

On cross-examination, defendant attempted to impeach Russell's credibility by showing that Russell had earlier made inconsistent statements to police investigators about their meeting in Houston. Defendant asked Russell whether they had in fact met in Houston, whether Russell had told investigators it was in 1992 rather than in 1991 when they first met, and whether Russell had told the investigators that defendant and his companions had flown, rather than driven, to Houston. Defendant also challenged Russell's claim that defendant's purpose in coming to California was to commit drug-dealer robberies with defendant.

Before redirect examination, the prosecutor argued to the court that defendant had "opened the door" to examination about "drug rip-offs," including whether defendant's purpose in going to Texas was to rob drug dealers. The trial court agreed the subject area had been opened up through defendant's questions about Texas, drug-dealer robberies, when defendant went to Texas and with whom, when he first met Russell, and why Russell came to California. When defendant argued he was only asking Russell to explain inconsistencies in Russell's testimony and statements, the court told him the questioning had not been narrow: "[Y]ou conducted a lot of examination concerning that type of an issue, what was going on in Texas, why you were there, what you did there, how long you stayed there, when you came back to California, when Mr. Russell came to California, why he came to California, who he stayed with, what he did, did he work, did you work, et cetera."

On redirect examination, Russell testified, without objection from defendant, that defendant and his companions had come to Texas to rob drug dealers because Texas drug dealers were less wary of robbery and did not secure their money as carefully. Russell

further testified that he had set up two drug dealers for robbery by defendant.

Pursuant to Evidence Code section 353, subdivision (a), a judgment may not be set aside on grounds of erroneous admission of evidence unless there appears of record a timely objection "so stated as to make clear the specific ground of the objection . . . ." Here, defendant's objection was only that the matter of drug-dealer robberies was beyond the scope of his cross-examination; there was no objection on Evidence Code section 352 or 1101 grounds. Accordingly, objections on those grounds were waived.

"It is well settled that when a witness is questioned on cross-examination as to matters relevant to the subject of the direct examination but not elicited on the examination, he may be examined on redirect as to such new matter." (People v. Kynette (1940) 15 Cal.2d 731, 752.) "Upon redirect examination it is proper to permit the witness to state facts and circumstances that tend to correct or repel any wrong impressions or inferences that might arise on matters drawn out on cross-examination." (Myers v. Rose (1938) 27 Cal.App.2d 87, 89.) "A trial court's exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice. [Citation.] In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered. [Citation.]" (People v. Stewart (1985) 171 Cal.App.3d 59, 65.)

On this record, we conclude the trial court did not abuse its discretion in admitting, during redirect examination, without objection from defendant, evidence of a crime unrelated to the current charges which Russell claimed defendant had committed in Texas in 1991.

No Denial of Right of Confrontation

Defendant contends the trial court denied him his Sixth Amendment right of confrontation and cross-examination, and due process, by precluding him from inquiring "whether Mr. Russell hoped to gain from his testimony in this case any benefit in regard to matters pending against him in Texas." The contention is without merit.

Before Russell took the witness stand, the prosecutor informed the court outside the presence of the jury that "at one point . . . there was a request to extradite Mr. Russell out of Texas for a murder"; that the extradition request was no longer pending; and that he did not believe Russell had been convicted of murder in Texas. The prosecutor then moved to exclude any reference to Russell "as a suspect in a murder or him being extradited for murder or charged with murder or anything along those lines out of Texas in this case."

The following colloquy ensued: "MR. MITCHELL: In other words, that's saying I can't ask him has he ever committed similar crimes to this before?

"THE COURT: Well, that you can't ask in any event unless you have evidence to present to establish that conduct. Again, if he does testify, you have the right to offer evidence that would impeach his credibility. . . . And if Mr. Hood does not bring those out on direct, you can certainly bring those out on cross-examination because the relevance bears upon credibility.

". . . . . .

"MR. MITCHELL: I just have one question then. Maybe you can direct to Mr. Hood then and we could answer this and then I wouldn't have any other reason to bring it up. Was any deal made with Mr. Russell pertaining to that Texas extradition situation.

"THE COURT: That's a very good point.

"MR. MITCHELL: Concerning --

"THE COURT: I understand exactly what you are saying. That's a very good point. If, in fact, there has been some assistance provided by the People in this particular case with respect to your pending matter in Texas and that's part of the motivation as to why Mr. Russell is testifying, then you could certainly go into it, if that be the case.

"MR. MITCHELL: That's why I am asking now, sir, to find out.

"THE COURT: Yes, that's a reasonable request because you do have a right to attempt to impeach credibility and to show a prejudice or bias or motivation as to why somebody is testifying. And if there was some type of arrangement made with respect to that by the People in this case, it certainly would be relevant."

Further down the colloquy, the exchange continued: "THE COURT: . . . In the absence of some evidence that you might have, Mr. Mitchell, that the People in this case suggested to Mr. Russell in some fashion that they would assist him on his matters in Texas, whether it be the present extradition matter for violation of parole or whether it be this other matter where apparently there was a murder charge pending, in the absence of some evidence, did that play in his motivation to testify, I would rule that it's all legally inadmissible. [¶] If there is evidence that that was discussed and considered and formed a basis or the part of the basis for Mr. Russell to testify in this case, then it certainly would be admissible because it was relevant to show a motivation as to why he is testifying, to wit, he is trying to help himself on his pending matters in Texas and in exchange for that help, he is testifying in the fashion he is testifying in. [¶] But again, based on the representations made by the People and based upon the agreement they claim you have, there's apparently been no discussion of any whatsoever of any type involving the Texas matters.

"MR. MITCHELL: I would still be concerned that it appears to be suspicious that suddenly Mr. Russell wouldn't be charged with murder in another jurisdiction and he would suddenly become a witness in Santa Clara County.

"THE COURT: I can't answer that for you and I don't know anything about the Texas matters. I don't know anything about the Texas charge or why it was filed or why it was withdrawn. None of that is before the court. [¶] I am simply saying in the absence of any evidence that that played a factor in his deciding to testify, it's all irrelevant. If it did play a factor and it was suggested to him that perhaps the People could help him on those Texas matters, et cetera, then of course it would be relevant and you could examine him about it.

. . .

". . . . . .

"MR. MITCHELL: One other area that I want to cover about that is I didn't see in here any -- anything about in the agreement about Mr. Russell's extradition to Texas for his probation violation. And I was just curious as to whether or not that was going to be something that would be done as a part of his deal with them, that he would go to Texas to serve his time that he's been offered here.

"THE COURT: If you feel that that's part of his motivation, that he wants to go to Texas to serve his time on this charge, you can ask him that question.

"MR. MITCHELL: Thank you, sir.

"THE COURT: If you feel that he is testifying in the fashion he is because he simply wants to get out of California and go to Texas and this is the fastest way he can do it and he is receiving assistance in that respect, you can ask him.

"MR. MITCHELL: Thank you, sir."

Clearly, on this record, there was no violation of defendant's right of confrontation and cross-examination, and due process. The court did not preclude defendant from cross-examining Russell on his motivation for changing his plea and testifying for the prosecution. Specifically, the court did not preclude defendant from asking Russell if Russell stood to benefit from testifying as he did.

The cross-examination restrictions imposed by the court did not amount to abuse of discretion. As stated in Delaware v. Van Arsdall (1986) 475 U.S. 673, 679: "It does not follow . . . that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause in concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. . . . '[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' [Citation.]"

No Error in Credit Card Fraud Instructions

Defendant contends count 6 must be reversed because the trial court failed to instruct that an essential element of the charged crime was that the credit card must have been stolen. We disagree.

At the time of the commission of the crime charged in count 6, section 484g provided: "Every person, who with intent to defraud, (a) uses for the purpose of obtaining money, goods, services or anything else of value an access card obtained or retained in violation of Section 484e or an access card which he or she knows is

forged, expired, or revoked, or (b) obtains money, goods, services or anything else of value by representing without the consent of the cardholder that he or she is the holder of an access card or by representing that he or she is the holder of an access card and the card has not in fact been issued, is guilty of theft. If the value of all money, goods, services and other things of value obtained in violation of this section exceeds four hundred dollars ($400) in any consecutive six-month period, then the same shall constitute grand theft." (See Stats. 1986, ch. 1436, § 4.)

As should be noted, section 484g does not require proof that the credit card was stolen. All it requires is that the card was "obtained or retained in violation of Section 484e," and thereafter used with the knowledge that it was so obtained or retained. Section 484e, subdivision (a), on the other hand, provides that "[e]very person who acquires an access card from another without the cardholder's or issuer's consent or who, with knowledge that it has been so acquired, acquires the access card, with intent to use it or to sell or transfer it to a person other than the issuer or the cardholder is guilty of petty theft." Subdivision (c) of section 484e further provides that "[e]very person who sells, transfers, conveys, or receives an access card with the intent to defraud, or who acquires an access card with the intent to use it fraudulently, is guilty of grand theft."

The trial court's instruction to the jury read: "In order to prove this crime, each of the following elements must be proved: One, a person used an access card for the purpose of obtaining money, goods, services or anything else of value. Two, the person used the access card by representing without consent that he was the holder of the access card. And three, at the time of such use, the person had the specific intent to defraud."

Clearly, the instruction satisfied the elements of section 484g. Accordingly, there was no error.

We agree with defendant, however, that the count 6 conviction should be reduced from a felony to a misdemeanor. Section 484g plainly provides that a violation of that section is theft unless the value of all money, goods, services, and other things of value obtained exceeds $400 in any consecutive six-month period, in which case, the crime is grand theft.

Here, the wheels and tires which were ordered, and which had a retail value of $2,600, were never in fact delivered; they were not therefore "obtained" within the meaning of section 484g. As to the items that were actually purchased with the card, no evidence was presented to show that their combined value exceeded $400.

Respondent contends that the provision in section 484g defining as grand theft the obtaining of money, goods, services, et cetera, worth in excess of $400 is not the exclusive but only an alternative means of establishing grand theft. In support of this contention, respondent claims that because acquiring an access card with intent to defraud is already grand theft under section 484e, subdivision (c), use of a card so acquired cannot be less.

The flaw in this argument is that while section 484e is a means to commit a violation of section 484g, a violation of section 484e is a separate crime in itself. Hence, had defendant been separately charged with a violation of section 484e, subdivision (c), a conviction thereunder would have been grand theft, his misdemeanor conviction under section 484g would have been in addition thereto. But because defendant was not so separately charged, the People cannot here bootstrap the penalty for the greater crime not charged to the lesser crime that was charged.

Moreover, in construing criminal statutes, "[i]f the statutory language is ambiguous and susceptible to two plausible interpretations, we must, because this is a criminal statute, adopt the one more favorable to the defendant. [Citation.]" (People v. Bransford (1994) 8 Cal.4th 885, 895 (conc. and dis. opn. of Kennard, J.).)

Accordingly, on count 6, we must remand for resentencing.

Materiality a Jury Question

Defendant contends the trial court erred in instructing the jury with respect to count 10 that certain allegedly false statements in defendant's application for a California driver's license were material matters within the meaning of the elements of the crime of perjury, because such instruction removed the question of materiality from the jury. We agree.

In People v. Jimenez (1992) 11 Cal.App.4th 1611, 1622, this court, relying on People v. Lem You (1893) 97 Cal. 224, 228 (hereafter, Lem You), held that the issue of materiality in a perjury prosecution "is a question 'of law for the court, and not of fact for the jury.'" Although we were critical of that rule, noting that the continuing validity of that proposition has been put to question in light of modern due process requirements, we felt bound to apply it until Lem You was reversed. (11 Cal.App.4th at pp. 1622-1623.)

Recently, in People v. Kobrin (1995) 11 Cal.4th 416, 427, footnote 7, the Supreme Court, citing the recent opinion of the United States Supreme Court in U.S. v. Gaudin (1995) 515 U.S. ___ [115 S.Ct. 2310], expressly overruled Lem You. the Kobrin court held that (1) "'materiality' constitutes an element of the crime of perjury" (11 Cal.4th at p. 426); (2) the due process clause requires that the jury determine the question of materiality in a perjury prosecution (id. at pp. 423-424); and (3) the failure of the court to instruct the jury on

materiality requires reversal per se because "it infects the structural integrity of the trial process" (id. at p. 428). Gaudin had held that materiality in a prosecution under 18 United States Code section 1001, which prohibits making false statements or representations of material fact to a federal department or agency, is a question of fact for the jury. (U.S. v. Gaudin, supra, 115 S.Ct. at p. 2314.)

Because the removal of the materiality issue from the jury is reversible per se, the trial court's error is incurable by harmless error analysis. (People v. Kobrin, supra, 11 Cal.4th at pp. 428-430.)

No Error in Imposing Restitution Fine of $5,000

Defendant contends the restitution fine of $5,000 must be reduced to the minimum of $200, or the case be remanded for a determination of his ability to pay. We disagree.

Although present law no longer requires a finding of ability to pay, this case is governed by former Government code section 13967, subdivision (a), which provided in pertinent part that "if the person is convicted of one or more felony offenses, the court shall impose a . . . restitution fine of not less than two hundred dollars ($200), subject to the defendant's ability to pay, and not more than ten thousand dollars ($10,000)." (See Stats. 1992, ch. 682, § 4.)

There was no requirement under former Government Code section 13967, subdivision (a), that the trial court make an express determination on the record of a defendant's ability to pay. (People v. Frye (1994) 21 Cal.App.4th 1483, 1485-1486.) Defendant's ability to pay could be implied from the record. (Ibid.) Further, the court was "not limited to considering a defendant's present ability but may consider a defendant's ability to pay in the future." (Id. at p. 1487.) The court could consider that as a prison inmate defendant would be

compensated for performing work assigned to him. (Ibid.) On appeal, the trial court's finding of ability to pay will be upheld if supported by the record. (People v. Staley (1992) 10 Cal.App.4th 782, 785-786.)

Here, the court explicitly found defendant had ability to pay. At the sentencing hearing on June 16, 1994, the court stated: "With respect to the restitution fund fine, I do find you have an ability to pay. I do find that there is no question but that you will be involved in a work program in the Department of Corrections . . . . I know from your own statements and from the probation report and from the evidence that you are able-bodied, that you can work. You were physically fit per your own statements repeatedly; you keep yourself in condition. You don't abuse drugs or alcohol. You take care of yourself physically, so you certainly are able to work. You will work, I assume, and if you do work you will receive monies. Out of those monies the Department of Corrections will take an appropriate portion to pay to the restitution fund fine."

The trial court's finding of defendant's ability to pay is supported by the record. The fact alone that defendant's total term of imprisonment is 14 years indicates that defendant has that much time to work in prison to earn the $5,000 restitution fine. Accordingly, we find no abuse of discretion.

DISPOSITION

The judgment of conviction on count 10 is reversed. In all other respects, the judgment is affirmed. This matter is remanded to the superior court for resentencing on count 6 in the manner indicated in this opinion.

Premo, Acting P.J.

WE CONCUR:

Elia, J.

Mihara, J.

PEOPLE v. MITCHELL
No. H012785

APPENDIX B

APPENDIX B

Sixth Appellate District No. H012785
S051386

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
MAR 27 1996
Robert Wandruff Clerk
Deputy

THE PEOPLE, Respondent

v.

JESS RODERICK MITCHELL, Appellant

Petitions for review DENIED.

LUCAS

Chief Justice